BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARTHA FERNANDEZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,036,799
McDONALD'S	)	
Respondent	)	
AND	)	
	)	
KANSAS RESTAURANT & HOSPITALITY ASSOCIATION	)	
Insurance Carrier	)	

ORDER

Claimant appeals the April 20, 2010, Award of Administrative Law Judge Rebecca A. Sanders (ALJ). Claimant was awarded a 7 percent functional disability to the whole person for injuries suffered on August 4, 2007. Claimant was denied a permanent partial general (work) disability after the ALJ found that public policy prohibits an illegal immigrant from collecting a work disability as a worker in this country illegally cannot adhere to the purpose of the Kansas Workers Compensation Act (Act), that being to return to work legally.

Claimant appeared by her attorney, Conn Felix Sanchez of Kansas City, Kansas. Respondent and its insurance carrier appeared by their attorney, Wade A. Dorothy of Overland Park, Kansas.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on July 21, 2010.

ISSUE

What is the nature and extent of claimant's injury and disability? Claimant argues that she is permanently and totally disabled from any type of employment as the result of the injuries suffered on August 4, 2007, while working for respondent. In the alternative, claimant contends that she is entitled to a work disability under K.S.A. 44-510e. Respondent disputes claimant's entitlement to any award beyond her whole person

functional impairment as claimant is not in this country legally. Therefore, no work disability can be awarded. Additionally, respondent disputes claimant's claim that she is permanently and totally disabled. Claimant also contends that her use of Lortab after the accident contributed to her seizure disorder. Respondent argues that the medical evidence in this matter fails to support claimant's claim that there is a connection between her taking Lortab and her seizures.

FINDINGS OF FACT

Claimant began working for respondent in September 2006 as a crew person in the grill area. On August 4, 2007, while carrying a box of meat, she slipped and fell. Claimant felt pain after the fall. In a few minutes, she started having severe pain in her back. It was reported to her manager, and claimant was taken to the emergency room at St. Francis Health Center in Topeka, Kansas, where she was treated initially by Dr. Donald Mead. Claimant was given pain medication and referred for physical therapy. An MRI displayed no significant abnormality. Claimant was later referred by respondent to board certified physical medicine and rehabilitation, and pain management specialist Joseph F. Galate, M.D., on October 2, 2007. At that time, claimant had pain across her low back into her left gluteal region and into her left leg and foot. Dr. Galate read the MRI as showing mild sclerotic changes through her lumbar spine with no evidence of central stenosis, foraminal narrowing or thecal attenuation at any level. Claimant was deconditioned, with limited range of motion. However, her motor examination was normal and her muscle stretch reflexes and sensory were normal. Dr. Galate was unable to correlate claimant's radicular complaints in her leg with the findings from the examination, the MRI or the x-rays.

Dr. Galate recommended that claimant try to get off narcotic medication, start on anti-inflammatory medicines and begin physical therapy. At the next examination on October 30, 2007, claimant indicated that she had not been attending physical therapy. In the October 30 report, Dr. Galate objected to claimant's lack of cooperation with the physical therapy and instructed claimant that the lack of cooperation would not be tolerated. Claimant was still having pain over her left SI joint and piriformis muscle, but the range of motion in her spine looked better. However, at the October 30 examination, claimant also complained of pain down her arms, into her lower back and down the front and back of her legs. Dr. Galate discussed doing a diagnostic therapeutic injection of claimant's sacroiliac joint. Claimant initially agreed, but did not attend the scheduled appointment for the injection. The appointment for the injection was rescheduled for February 1, 2008, but claimant failed to attend that appointment as well. At that time, claimant was released by Dr. Galate at maximum medical improvement (MMI). Due to claimant's noncompliance with the physical therapy, Dr. Galate determined that he had nothing else to offer claimant. Dr. Galate opined that claimant had suffered no permanent impairment as the result of her work-related accident. Pursuant to the fourth edition of

the AMA *Guides*[1], claimant fell in the DRE category I. After reviewing the task list of vocational expert Dick Santner, Dr. Galate determined that claimant could perform all 11 tasks on the list for a zero percent task loss. On cross-examination, Dr. Galate was asked whether the AMA *Guides* required a rating even with a noncompliant patient. He responded that claimant may have had sacroiliac dysfunction but he was unable to make that diagnosis without the SI joint injection. If claimant did have a sacroiliac joint dysfunction, that would have justified a rating under the fourth edition of the AMA *Guides*. Dr. Galate was asked whether Lortab caused claimant's seizure. He was unable to state within a reasonable degree of medical certainty that claimant's use of Lortab caused her seizure disorder.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., for an examination on February 23, 2009. Dr. Murati diagnosed claimant with right SI joint dysfunction, low back pain with signs and symptoms of radiculopathy and seizure disorder. He determined that claimant fell within a DRE Lumbosacral Category III, with a resulting 10 percent whole person impairment under the fourth edition of the AMA *Guides*.[2] Dr. Murati restricted claimant from crawling. In addition, claimant was to rarely bend, crouch and stoop; and occasionally lift, carry, push and pull to 20 pounds; and occasionally sit, stand, walk, climb stairs and ladders, squat and drive; and frequently lift, carry, push and pull to 10 pounds; and alternate sit, stand and walk as needed. After reviewing the task list from Mr. Santner, Dr. Murati opined that claimant was unable to perform any of the previous tasks for a 100 percent task loss. Claimant was not able to return to work for respondent. With the finding of a 100 percent task loss, claimant is permanently and totally disabled. Dr. Murati agreed, on cross-examination, that claimant was diagnosed with only a lumbar strain when claimant went to the emergency room at St. Francis Health Center. Additionally, Dr. Murati acknowledged that he had no x-ray films to review when he examined claimant. No EMG studies were done to confirm the finding of radiculopathy. Dr. Murati was unable to state within a reasonable degree of medical probability that the diagnosis of a seizure disorder was related to claimant's work-related injury. When asked on cross-examination, Dr. Murati stated "I don't know what is going on with that."[3]

Claimant was referred by the ALJ for an independent medical examination (IME) with board certified orthopedic surgeon Edward J. Prostic, M.D., on December 7, 2009. Dr. Prostic's report of that date identifies the medical treatment provided claimant at St. Francis Health Center, and by Dr. Mead, Dr. Galate and Dr. Murati. Dr. Prostic made

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[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[2] AMA *Guides* (4th ed.).

[3] Murati Depo. at 11.

note of the MRI performed on claimant and the lack of significant abnormality from that test.

At the time of Dr. Prostic's examination, claimant complained of almost constant pain in the center of her low back with intermittent symptoms down the left leg. Claimant complained of worsening with almost all activities. The physical examination found claimant's lumbar spine alignment to be satisfactory. Claimant displayed tenderness at L4 to the sacrum, midline and over the paraspinous muscles bilaterally. Her range of motion was somewhat restricted, and the left thigh was one-half inch less in circumference than the right 4 inches above the superior pole of the patella and the left calf was 1 inch less in circumference than the right. Neither leg displayed weakness, sensation was decreased throughout the left lower extremity and reflexes were symmetrical but hypoactive. Lumbar spine x-rays done in Dr. Prostic's office were read as normal. Dr. Prostic found no evidence to indicate claimant's injury was more than a sprain or strain. He determined that claimant's failure to improve implied barriers to improvement which may be psychological. Claimant was rated at 7 percent to the whole body pursuant to the fourth edition of the AMA *Guides*.[4] Dr. Prostic concluded that there was no physical reason to include work restrictions for claimant other than the fact claimant was severely deconditioned. Dr. Prostic reviewed the task list prepared by Dick Santner and determined that claimant was unable to perform 2 of 11 tasks for an 18 percent task loss.

Claimant was referred by her attorney to Dick Santner, vocational specialist, for an evaluation on November 14, 2008. At the time of the evaluation, claimant had yet to see Dr. Murati or Dr. Prostic, and Dr. Galate's records had not been made available to him. Mr. Santner did create the 11-task task list which was later reviewed by Dr. Murati and Dr. Prostic. Mr. Santner opined that without medical records, he would be unable to provide any direction relative to her future work. At the time of his deposition, the medical reports of Dr. Murati and Dr. Prostic were made available to Mr. Santner. He determined that claimant would be able to work if she could find a job which did not require claimant to sit more than one-third of the day. Claimant would have to be able to stand and walk at least two-thirds of the day. A job which required that claimant sit more than one-third of the day would be outside claimant's ability according to Dr. Murati's restrictions. Mr. Santner noted that Dr. Prostic placed no work restrictions on claimant.

[4] AMA *Guides* (4th ed.).

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[8]

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment.[9]

Claimant contends that she is permanently and totally disabled as the result of the accident on August 4, 2007. While Dr. Murati may somewhat agree, neither Dr. Galate nor Dr. Prostic find claimant unable to work. Dr. Galate even went so far as to decline to provide claimant with any restrictions, although that appears to be more from frustration

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[5] K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[7] K.S.A. 2007 Supp. 44-501(a).

[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[9] K.S.A. 44-510c(a)(2).

due to claimant's refusal to cooperate with the physical therapy prescribed by Dr. Galate. Even Dick Santner acknowledged that claimant would work so long as the less than one-third of the day sitting restriction was not violated. The Board finds that claimant has not proven that she is permanently and totally disabled.

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[10]

Dr. Galate provided no functional impairment rating for claimant. However, his motivation appeared more from frustration rather than from a legitimate medical determination. He admitted that the sacroiliac dysfunction could have been the basis for a functional impairment had claimant followed through with the SI injections. Dr. Murati rated claimant at 10 percent to the whole person, but acknowledged that no EMG studies were done to confirm the presence of radiculopathy. Dr. Prostic's 7 percent whole person rating was adopted by the ALJ as the most persuasive. The Board agrees. The determination by the ALJ to adopt Dr. Prostic's functional impairment rating is affirmed.

Claimant contends that the seizure disorder, which developed after claimant was placed on the Lortab, was due to the medication. In this record, no health care professional was able or willing to state within a reasonable degree of medical probability or certainty that the Lortab caused the seizure. Without medical proof tying the seizure disorder to the medication, claimant fails in her burden. The denial of benefits by the ALJ on this issue is affirmed.

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[11]

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[10] K.S.A. 44-510e(a).

[11] K.S.A. 44-510e.

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[12]

The ALJ denied claimant a work disability under K.S.A. 44-510e due to claimant's illegal alien status. The ALJ ruled that, as a matter of public policy, a worker illegally in the United States cannot attempt to adhere to the purpose of the Act as the worker cannot legally obtain a job in this country. The ALJ held that this "public policy" is not abrogated by *Bergstrom*.[13]

In *Bergstrom*, the Kansas Supreme Court said that the fact finder should follow and apply the plain language of the statute. K.S.A. 44-510e provides that once an injured worker is no longer earning 90 percent or more of her pre-injury average weekly wage, then the measure of disability is the percentage of task loss averaged with the percentage of wage loss. And the wage loss is determined by comparing the pre-injury average weekly wage with the actual post-injury earnings, if any. The Court, in *Bergstrom*, further held that K.S.A. 44-510e contains no requirement that an injured worker make a good-faith effort to seek post-injury employment to mitigate the employer's liability, citing and disapproving *Foulk*[14] and *Copeland*[15] and all subsequent cases that have imposed a good-faith effort requirement on injured workers.[16] The Court further noted that it had consistently elected to refrain from reading language into the statutes that the legislature did not include.[17]

Here, the determination by the ALJ that public policy prohibits a work disability award to an illegal alien is not founded in statutory language. "Judicial blacksmithing will be rejected even if such judicial interpretations have been judicially implied to further the perceived legislative intent."[18] Based on the rules of statutory construction set forth in

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[12] K.S.A. 44-510e.

[13] *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[14] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[15] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[16] *Bergstrom, supra, at 610.*

[17] *Id*. at 609.

[18] *Tyler v. Goodyear Tire & Rubber Company*, 43 Kan. App. 2d 386, 224 P.3d 1197 (2010).

Bergstrom, the Board finds that claimant is entitled to a work disability under K.S.A. 44-510e.

Dr. Galate found claimant had suffered no loss of task performing abilities. Dr. Murati found that claimant retained no ability to perform any of the tasks she had performed over the last 15 years. It is no wonder the ALJ elected to refer claimant for an IME with Dr. Prostic. After reviewing the task list provided by Mr. Santner, Dr. Prostic determined that claimant had lost the ability to perform 2 of the 11 tasks on the list for an 18 percent task loss. The Board finds the opinion of Dr. Prostic to be the most persuasive and adopts same. As claimant is not working, her wage loss is 100 percent. Pursuant to K.S.A. 44-510e, and after averaging claimant's wage loss with her task loss, the Board finds claimant has suffered a work disability of 59 percent.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to the award of a 7 percent permanent partial disability on a functional basis and the denial of an award for a permanent total disability, but reversed with regard to the denial of a work disability under K.S.A. 44-510e. Claimant has suffered a 59 percent permanent partial whole body disability from the injuries suffered on August 4, 2007.

The Board notes that claimant's brief contains numerous typographical and grammatical errors, making it difficult at times to determine the intent of the author. Counsel would do well in the future to pay closer attention to such details.

The Award sets out findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. The Board adopts those findings and conclusions as its own insofar as they do not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Rebecca A. Sanders dated April 20, 2010, should be, and is hereby, affirmed in that claimant has suffered a 7 percent whole person permanent disability on a functional basis, but reversed with regard to the denial of a permanent partial general (work) disability under K.S.A. 44-510e. Claimant is awarded a permanent partial general disability of 59 percent.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Martha Fernandez, and against the respondent, McDonald's, and its insurance carrier, Kansas Restaurant & Hospitality Association, for an accidental injury which occurred on August 4, 2007, and based upon an average weekly wage of $175.93.

Claimant is entitled to 12.36 weeks of temporary total disability compensation at the rate of $117.29 per week totaling $1,449.70, followed by 244.85 weeks of permanent partial disability compensation at the rate of $117.29 per week totaling $28,718.46 for a 59 percent work disability, making a total award of $30,168.16.

As of August 6, 2010, there would be due and owing to claimant 12.36 weeks of temporary total disability compensation at the rate of $117.29 per week in the sum of $1,449.70, plus 144.50 weeks of permanent partial disability compensation at the rate of $117.29 per week in the sum of $16,948.41, for a total due and owing of $18,398.11, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $11,770.05 shall be paid at the rate of $117.29 per week for 100.35 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of August, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the opinion of the majority. Claimant acknowledged that she is not in this country legally. The permanent partial general disability portion of the award is determined, in part, on claimant's wage earnings as compared to her average weekly wage from the date of accident. K.S.A. 44-510g(a) states: "A primary purpose of the workers compensation act shall be to restore the injured employee to work at a comparable wage." Claimant's illegal-alien status makes it a legal impossibility to satisfy this purpose. *Bergstrom* requires that the language of the statutes be followed and applied by the fact finder. The "public policy" determination by the ALJ should be based on the specific language of K.S.A. 44-510g(a). So long as it is claimant's status which bars her from even seeking employment in this country, the purpose of the statute remains an impossibility. Claimant's award should be limited to her functional impairment.[19]

BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge

[19] See *Martinez v. Gilmore Roustabout Service*, No.1, 002,214, 2003 WL 22704164 (Kan. WCAB Oct. 17, 2003); and *Zepeda v. Nancy & Nora Flores d/b/a L&F Originals, LLP*, No. 1,023,273, 2006 WL 1933443 (Kan. WCAB June 15, 2006).